UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
WILLIAM ELLIS DONOHO, JR.,	)	CASE NO. 99-34194 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
J.T. SHANNON LUMBER COMPANY, INC.,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 00-3043
	)	
WILLIAM ELLIS DONOHO, JR.,	)	
	)	
DEFENDANT.	)	

Appearances:

Robert W. Mysliwiec, Esq., attorney for plaintiff, 150 West Angela Boulevard, South Bend, Indiana 46617; Scott A. Frick, Esq., attorney for plaintiff, 81 Monroe Avenue, Suite 2000, Memphis, Tennessee 38103; and William G. Lavery, Esq., attorney for defendant, 600 South Main Street, Suite 2000, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 15, 2002.

On May 5, 2000, Plaintiff J.T. Shannon Lumber, Inc. ("Shannon" or "plaintiff"), filed its Complaint to Determine Dischargeability of Debt and Objection to Debtor's Discharge. The defendant William Ellis Donoho, Jr. ("debtor" or "defendant") filed his Answer on June 27, 2000, denying the essential allegations and presenting affirmative defenses. The parties filed a Joint Pre-Trial Statement on March 9, 2001, in which they stated that they expected to file motions for summary judgment. And indeed, both parties filed their motions for summary judgment and memoranda in support of the motions on May 11, 2001. Each party filed an opposition brief, and

the defendant filed a reply brief. After the plaintiff filed a Supplemental Memorandum of Points and Authorities, the court took the cross motions for summary judgment under advisement on October 5, 2001.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) and (J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The defendant presently lives in Chula, Missouri, but he had lived in Goshen, Indiana, for ten years before moving back to Missouri. In June 1992, he began operating Donoho Hardwood Services, a sole proprietorship in the business of buying and selling lumber in Goshen. In his business, the defendant received orders from customers for a certain type and quantity of hardwood lumber; he then contacted suppliers such as the plaintiff to determine the cost for that lumber. The defendant placed orders for the lumber requested by his customers and arranged for its shipment from the supplier to the customers. On the invoices he sent to his customers were included the supplier's costs, the freight charges, and a mark-up for profit. The defendant invoiced his customers on a net thirty-day term basis and offered a 1% discount to customers who pay within ten days.

One of the defendant's earliest suppliers was Frank Paxton Lumber Company, which was purchased by the plaintiff J.T. Shannon Lumber Company in 1996. In its complaint, the plaintiff described itself as a lumber company that supplies various types of hardwood lumber. It is a corporation with its principal place of business in Southaven, Mississippi, and it has subsidiary corporations that supply hardwood lumber as well. Between July and September 1999, the defendant ordered approximately $238,081.91 of hardwood lumber from the plaintiff (or its subsidiaries) for which the defendant did not pay the plaintiff. During that same time period, the defendant ordered hardwood lumber from other companies for which it did not make payment:

$127,571.38 from Strong Forrest Products ("Strong")
$ 81,674.55 from Devereaux Sawmill, Inc. ("Devereaux")
$ 48,641.85 from Western Kentucky Lumber ("Western")
$ 13,512.03 from Anderson Forrest Products ("Anderson")

The defendant then ceased doing business as Donoho Hardwood Services on September 27, 1999. Between September 16, 1999, and September 27, 1999, the defendant completed five separate orders of hardwood lumber to various customers and received payment from those customers totaling $97,187.05. On September 29, 1999, KeyBank exercised a setoff against the defendant's business account in the amount of $135,159.77 in partial satisfaction on a total indebtedness owed to KeyBank in the approximate amount of $208,000.00.

In its complaint, the plaintiff alleged that the defendant made no deposits of any receipts into his business account after September 27, 1999, even though he received one or more of the customers' payments on or after September 28, 1999. According to the complaint, the defendant used some of those payments to pay the remaining balances due to KeyBank. He received a check from L.R. Nisley & Sons, for example, in the amount of $24,553.61. Using that check, the plaintiff alleged, the defendant obtained a cashier's check made payable to KeyBank in the amount of $21,000.00 and retained the balance of approximately $3,000.00.

The defendant filed his voluntary chapter 7 petition on November 4, 1999. He listed the abovementioned hardwood orders as unsecured debts for goods he obtained on credit and shipped to the

defendant's customers. According to the defendant's bankruptcy schedules, the defendant owes $509,481.72 to the plaintiff, Anderson, Devereaux, Strong, and Western. The plaintiff alleged that the defendant received payment from all his customers for those hardwood products ordered from the defendant, but did not report the payment as accounts receivables in his schedule B.

The complaint also alleged that, in his original Statement of Financial Affairs, the defendant did not identify any payments to KeyBank except $7,129.17 in payments made in August and September 1999. In addition, the defendant did not identify any setoffs by KeyBank. On April 17, 2000, the defendant filed an Amended Statement of Financial Affairs identifying two setoffs by KeyBank in the amounts of $8,546.65 and $135,159.77. However, the plaintiff alleged, the defendant still failed to identify approximately $65,000.00 in payments to KeyBank within 90 days prior to the defendant's filing of his bankruptcy petition. The defendant signed his schedules and Statement of Financial Affairs under penalty of perjury.

In Count I of the Complaint, the plaintiff alleged that the defendant obtained property, services, or an extension of credit from the plaintiff using false pretenses or actual fraud. It submitted that the defendant's debt to the plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2).

In Count II, the plaintiff alleged that the defendant received in excess of $500,000.00 from customers for hardwood products ordered from the defendant. Excluding the amounts paid to KeyBank, the defendant received in excess of $300,000.00, the disposition of which cannot be derived from the defendant's bankruptcy schedules. After September 27, 1999, the defendant received approximately $97,187.05 in proceeds from customers, a portion of which was transferred to KeyBank and the rest retained by the defendant. However, the defendant failed to disclose payments made to KeyBank after September 29, 1999, in his bankruptcy schedules. The plaintiff alleged that the defendant failed to disclose the disposition of the remaining proceeds he received on the invoices and the disposition of other proceeds he received for hardwood lumber shipped to his customers between July and September 1999. The defendant paid himself approximately $50,000.00 between June and

September, 1999, as well. The plaintiff also alleged that the defendant failed to explain satisfactorily the defendant's loss or deficiency of assets to meet the defendant's liabilities. Finally, the plaintiff alleged that the defendant knowingly and fraudulently made a false oath or account in connection with his bankruptcy case. The plaintiff asked that the defendant be denied his discharge pursuant to 11 U.S.C. § 727(a)(4) and (a)(5).

Following the complaint and answer, each party submitted a motion for summary judgment stating that there exists no genuine dispute of material facts and that each party is entitled to summary judgment as a matter of law.

A. Plaintiff's Motion for Summary Judgment

The plaintiff's motion for summary judgment urged the denial of the defendant's discharge under 11 U.S.C. § 727(a)(4) and (a)(5). The plaintiff listed the defendant's income for the years 1997, 1998, and 1999, and focused on the last four months of the defendant's business expenses. The defendant's ledgers reflected that the defendant made a number of payments, or draw checks, to himself – $47,800.00 in the last four months of the operation of his business.

The defendant sent invoices to his customers, from September 3 through 27, 1999, charging a total of $183,434.13 for materials they ordered. The shipments were filled by Strong, Devereaux, and the plaintiff. Three cash receipts were deposited in the defendant's bank account: $13,412.93 on September 15, 1999; $47,105.53 on September 20, 1999; and $56,074.30 on September 27, 1999. The total of these deposits was $116,602.76. The complaint alleged that the difference between the billed amounts and the payments, $66,831.37, has not been accounted for; it was not deposited in the defendant's bank account.

On September 29, 1999, KeyBank exercised a setoff against the defendant's account to pay off a $200,000.00 line of credit. It set off $135,159.77. After the setoff, the defendant explained, all checks received were delivered to KeyBank to be applied against the balance owed on his line of credit. The plaintiff alleged that the defendant received a check from L.R. Nisley & Sons in the amount of $24,553.61, for example. He cashed

the check and had a cashier's check issued for $20,000.00. He kept the balance of approximately $4,000.00. The plaintiff also alleged that, after the line of credit was paid off, the bank released its mortgage on the defendant's house, which had secured the line of credit.

The plaintiff alleged that the defendant's original Statement of Financial Affairs, dated November 2, 1999, listed neither the payments to KeyBank nor the setoff exercised by KeyBank. When the defendant filed an Amended Statement of Financial Affairs, he identified the setoff exercised by KeyBank but did not disclose the approximately $63,000.00 of payments made to the bank after the September 29, 1999 setoff. According to the plaintiff, the defendant's failure to disclose those setoffs and payments to KeyBank were material omissions that constituted a false oath on his bankruptcy schedules. Moreover, it argued, the defendant's attempt to cure some of those omissions by filing an amended schedule did not expunge the original falsity of the petition. In fact, asserted the plaintiff, the defendant's amended statement still failed to disclose an additional $63,000.00 in prepetition payments to KeyBank after the setoff. The plaintiff urged this court to deny the defendant's discharge under § 727(a)(4).

The plaintiff requested, as well, that discharge of the defendant be denied under § 727(a)(5) for loss or dissipation of assets. It asserted that, between 1997 and 1999, the defendant realized income of $358,708.00, and that in 1999 alone his income was $105,497.00. Between June 7, 1998, and September 27, 1999, the defendant paid himself $47,800.00. However, by November 2, 1999, pointed out the plaintiff, the defendant's schedules reflected that his total assets amounted to only $9,324.00. It alleged that the defendant's schedules reflect that the defendant had no cash, no funds in bank accounts, no annuities, no interest in insurance policies or pension plans, no stock, no accounts receivables, and no real property. However, the defendant had no satisfactory explanation concerning the disposition of the substantial income between 1997 and 1999, his $47,800.00 in payments to himself, his retention of $4,000.00 in cash kept from the final check received from a customer, L.R. Nisley. The defendant's failure to explain satisfactorily the dissipation of his assets in the three

years prior to this bankruptcy filing required the denial of his discharge under § 727(a)(5), claimed the plaintiff.

B. Defendant's Motion for Summary Judgment

According to the defendant, in 1996 the plaintiff purchased the Frank Paxton Lumber Company, one of the defendant's first suppliers of lumber, and allowed the defendant to maintain a credit balance between $150,000.00 and $200,000.00 in the last few years. When he filed bankruptcy on November 4, 1999, the defendant owed Shannon $238,081.91. He stated that KeyBank, on September 29, 1999, offset the checking account in the amount of $143,706.42. At that time, the defendant had outstanding checks to creditors in the amount of about $110,000.00. Two of those checks were written to the plaintiff's companies and amounted to $44,068.22. The defendant stated in his affidavit that, at the time the checks were sent, there was sufficient money in the checking account to pay them; however, after the setoff, there were not sufficient funds. The defendant noted, as well, that he had paid the plaintiff about $177,150.00 in August 1999 and $133,887.00 in September 1999, for a total of about $311,038.00. He explained that all his business income went into the checking account offset by KeyBank, and all payments to business creditors were made from that checking account as well.

The defendant admitted that he failed to disclose the KeyBank setoff in his original Statement of Financial Affairs, but insisted that the omission was inadvertent and was voluntarily disclosed at the section 341 meeting on November 30, 1999, and later disclosed in the amended statement.

The defendant also admitted that he paid himself a salary, in the operation of his business, by taking draw checks from the checking account. He explained that he had maintained two personal banking accounts prior to bankruptcy — one at KeyBank and another at Middlebury State Bank. He stated that he used his draw checks, in part, to pay his monthly mortgage payment, automobile payments (for his 1974 Corvette and his

daughter's automobile), tuition payments for his daughter, and credit card bills. By the time he filed bankruptcy, he said, he had no cash.

The defendant argued that his debt to the plaintiff is dischargeable under 11 U.S.C. § 523(a)(2) and that he should not be denied a discharge under § 727(a)(4) and (a)(5).[1] With respect to the issue of dischargeability of the debt, the defendant asserts that plaintiff's claim actually is a breach of contract action — a claim that the defendant failed to fulfill a promise to pay for the plaintiff's goods on credit — and not a fraud action. He asserted that he had been buying hardwood on credit from Shannon for three years prior to filing bankruptcy, and when he wrote checks to Shannon on September 20, 1999, he had sufficient funds in his account to pay the checks. He noted that the plaintiff already had shipped the goods to the defendant's client when it received the two checks; it therefore had not relied on receiving the payment before sending the product. The defendant was not attempting to defraud the plaintiff, he contended.

He also asserted that he did not knowingly or fraudulently make a false oath or account in his bankruptcy schedules. The defendant admitted that he failed to disclose the KeyBank setoff in his Statement of Financial Affairs. However, he voluntarily disclosed the offset at the 341 meeting, and then filed an amended statement on April 17, 2000. He assured the court that he did not omit items from his bankruptcy statement deliberately or with an intent to deceive, and he pointed out that he raised the omission himself. He asked the court to deny the plaintiff's summary judgment motion and to grant his summary judgment motion.

With respect to the § 727(a)(5) claim of the plaintiff, the defendant stated that the plaintiff is not able to sustain its burden of establishing that the defendant failed to explain a loss or deficiency of assets. According to the defendant, the only property Shannon alleged that the defendant failed to explain is the income he paid himself in the five-month period prior to filing bankruptcy. However, the defendant previously had explained that

[1] The court notes that the plaintiff's motion for summary judgment included only the § 727 allegations and not the § 523 dischargeability issue.

he drew checks to pay himself a salary, intermittently and in small denominations, and had paid specific bills with those withdrawals. He stated that the plaintiff had not identified any "asset" which the defendant lost; even if the defendant's salary could be considered a lost asset, he claimed, he explained the disposition of it. Therefore, contended the defendant, the plaintiff has failed to prove that the defendant should be denied his discharge under § 727(a)(5), and the defendant's motion for summary judgment should be granted.

The defendant filed his Brief in Opposition to the plaintiff's motion for summary judgment (R. 28) and Reply Brief (R. 32). The plaintiff filed its Memorandum of Points and Authorities in Opposition to the defendant's summary judgment motion (R. 29) and Supplemental Memorandum of Points & Authorities supporting its own motion for summary judgment (R. 40). The court, having reviewed all the briefs, documents and evidentiary material submitted by the parties and having considered carefully the additional points argued by the parties in those supplementary documents, now considers the cross motions for summary judgment.

Discussion

The issue before the court is whether the defendant should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4) or (a)(5). Each party has submitted motions for summary judgment.

This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and "construe all inferences in favor of the party against whom the motion under consideration is made." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998) (citing *Andersen v. Chrysler Corp.*, 99 F.3d 846, 855 (7th Cir.1996); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 774 (7th Cir.1996)). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In determining whether summary judgment is appropriate in determining the denial of the debtor's discharge under 11 U.S.C. § 727, the court is mindful of the recognized purpose of the Bankruptcy Code to provide a fresh start for the honest debtor. *See Hudson v Reggio & Reggio, Inc. (In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997). In its consideration, the court keeps in mind that only in a rare case will it find sufficient proof of intent to warrant a determination that there is no genuine issue of material fact and that summary judgment is proper.

(1) Denial of discharge under 11 U.S.C. § 727(a)(4)

The plaintiff alleged that the debtor "knowingly and fraudulently, in or in connection with the case, made a false oath or account," in violation of § 727(a)(4). The plaintiff has the burden of proving that the debtor's sworn oath was false; then the burden shifts to the debtor to justify his actions. *See Hillis v. Martin (In re Martin)*, 124 B.R. 542, 544 (Bankr. N.D. Ind. 1991). Specifically, the plaintiff is required to establish that the debtor made a statement under oath that was false, was knowingly and fraudulently made, and related to a material matter. *See Krudy v. Scott (In re Scott)*, 227 B.R. 834, 841 (Bankr. S.D. Ind. 1998). The plaintiff must establish grounds for denial of discharge by a preponderance of the evidence. *See Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir. 1999).

In this case, it is undisputed that the defendant filed a Statement of Financial Affairs that failed to disclose the KeyBank setoff; that he explained the setoff in the section 341 meeting; and that he subsequently filed an Amended Statement of Financial Affairs to reflect the setoff. The plaintiff argues that a debtor's attempt to cure omissions by filing amended schedules does not expunge the original falsity of the petition. The defendant responds that he did not omit items deliberately and with intent to deceive, and that he raised the omission himself and amended his Statement to include the offset.

Courts finding that a debtor made knowingly false oaths in his original schedules and statement of financial affairs usually do not excuse the debtor when he amends the fraudulent documents. The courts reason that the amendments do not negate the fact that the debtor made the knowingly false statements and do not expunge the falsity of the sworn statement. *See, e.g., Sholdra v. Chilmark Fin'l LLP (In re Sholdra)*, 249 F.3d 380, 382-83 (5th Cir.), *cert. denied*, 122 S. Ct. 619 (2001); *see also Nof v. Gannon (In re Gannon)*, 173 B.R. 313, 320 (Bankr. S.D.N.Y. 1994); *Owensboro Nat'l Bank v. Gipe (In re Gipe)*, 157 B.R. 171, 178 (Bankr. M.D. Fla. 1993); *Barnett Bank v. Muscatell (In re Muscatell)*, 113 B.R. 72, 74-75 (Bankr. M.D. Fla. 1990).

Nevertheless, some courts, after reviewing amended schedules and financial statements that added the omitted information, have determined that a "statement is not deemed to be made with fraudulent intent simply because it is false." *Casa Investments Co. v. Brenes (In re Brenes)*, 261 B.R. 322, 334 (Bankr. D. Conn. 2001). "A discharge may not be denied under 11 U.S.C. § 727(a)(4)(A) where the untruth has been the result of mistake or inadvertence." *Id.* at 337. In *Brenes*, the plaintiffs demonstrated various omissions, misstatements and inaccuracies, but failed, after a six-day trial, to establish that they were made with fraudulent intent to conceal assets. The court noted that the debtor amended his bankruptcy schedules when the error was discovered and concluded that the misstatements were the product of inadvertent oversight and mistake and therefore that the objection to discharge should be denied. *Id.*

The Seventh Circuit Court of Appeals considered the factor of fraudulent intent under § 727(a)(2) and (a)(4) and affirmed the bankruptcy court's grant of summary judgment that denied the debtor a discharge of his debts. In *In re Chavin*, 150 F.3d 726 (7th Cir. 1998), the court explained that "[i]ntent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." *Id.* at 728. In *Chavin*, the debtor did not deny the untruthfulness of his 17 instances of false statements and misleading omissions, but asserted that fraudulent intent is subjective and is an issue of credibility that must be heard by a jury or trier of fact. The appellate court therefore considered whether the fraudulent intent requirement of § 727(a)(4) could be determined on summary judgment. It concluded:

> [C]redibility issues are to be left to the trier of fact to resolve on the basis of oral testimony *except* in extreme cases. The exceptional category is — exceptional. For the case to be classified as extreme, the testimony sought to be withheld from the trier of fact must be not just implausible, but utterly implausible in light of all relevant circumstances.

Id. The appellate court concluded that Chavin's case "fits the exceptional category as we have defined it." *Id.* at 729. The court found that the debtor was a mature and experienced businessman with properties worth millions of dollars just before bankruptcy. It further found that his explanations for failing to answer straightforward questions were "ridiculous." *Id.* The court of appeals determined that no reasonable person could believe Chavin's reasons for his many false representations and omissions. *See id.*

In this case, the court finds that, without question, the defendant omitted the bank's setoff from his Statement of Financial Affairs, and the defendant admitted it at the 341 meeting and amended his statement to add that information. Those facts are "consistent either with an inference of deliberateness or an inference of carelessness." *Desmond v. Varrasso (In re Varrasso)*, 37 F.3d 760, 764 (1st Cir. 1994). When the facts do not lead to a single conclusion, summary judgment is not proper. "In other words, the undisputed facts require a choice between competing inferences and, since both inferences are plausible, the choice cannot be made under the banner of summary judgment." *Id.* This court does not have before it the exceptional circumstance found

in *Chavin* or in many of the other cases that denied discharge based on false oath. The court finds that a trier of fact must determine whether the defendant's omission of the setoff (and, the plaintiff alleges, other checks as well) was deliberate or careless. Accordingly, both the plaintiff's and the defendant's motions for summary judgment on 11 U.S.C. § 727(a)(4) are denied.

(2) Denial of discharge under 11 U.S.C. § 727(a)(5)

The plaintiff also claimed that the court should grant him summary judgment pursuant to § 727(a)(5) because the debtor failed to explain adequately the loss or deficiency of certain assets. Section 727(a)(5) provides that the court "shall grant the debtor a discharge, unless (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities." The section "requires a *satisfactory* explanation for the whereabouts of a debtor's assets." *In re d'Agnese*, 86 F.3d 732, 734 (7th Cir. 1996). Once a plaintiff has established the disappearance of substantial assets, a debtor has the burden of explaining that loss or deficiency. A debtor who does not support his explanation of the disposition of his assets with satisfactory evidence — some documentation or adequate explanation for the missing assets, for example — can be denied a discharge under § 727(a)(5). *Id.* at 735. This section does not require fraudulent intent. *See Prairie Prod. Credit Ass'n v. Suttles (In re Suttles)*, 819 F.2d 764, 766 (7th Cir. 1987).

The plaintiff offered two examples of the defendant's loss or dissipation of assets. The plaintiff first pointed out that, between 1997 and 1999, the defendant realized substantial income – $358,708.00; however, by November 2, 1999, the defendant's total assets amounted to only $9,324.00. The defendant has no satisfactory explanation, alleged the plaintiff, concerning the disposition of the substantial income between 1997 and 1999 that dwindled to only $9,324.00 by the end of 1999. The plaintiff also noted that the defendant paid himself $47,800.00 between June 7, 1998, and September 27, 1999. There was no sufficient reason for the dissipation of almost $50,000 for himself and his retention of $4,000.00 in cash kept from the final check received from a customer,

L.R. Nisley. The defendant responded that he drew checks to pay himself a salary, from which he paid bills. In fact, the defendant said that he had explained the specific payments he made with those withdrawals. He insisted that his use of a salary from the business is a sufficient explanation of the use of $47,800.00 over a five-month period.

The court finds that the defendant's explanation that he paid himself a salary out of the business checking account is plausible, credible and satisfactory. *See In re Brenes*, 261 B.R. at 337-338. The plaintiff therefore has not been successful in his burden of demonstrating that the defendant is unable to explain the disposition of $47,800.00. Moreover, the court finds that the plaintiff was unable to make out a *prima facie* case by asserting that the defendant had substantial income between 1997 and 1999. The plaintiff has the initial burden of going forward by introducing more than the mere allegation that the defendant has failed to explain losses. *See* 6 *Collier on Bankruptcy* ¶ 727.08 at 727-46 (Lawrence P. King, ed., 15th ed. rev. 2001). "The plaintiff must still identify particular assets which have been lost." *Id*; *see also Ehle v. Brien (In re Brien)*, 208 B.R. 255, 258 (1st Cir. B.A.P. 1997). The court finds that the plaintiff has not met its burden of identifying particular assets and of showing that the defendant had them at one time but no longer has them. Accordingly, the court denies the plaintiff's request that the defendant's discharge be denied under § 727(a)(5). Nevertheless, the court also finds that the defendant's explanation does not leave the court with the conviction that there are no genuine issues of material fact about the precipitous decline of the defendant's business in its last two years and about the amount of his salary just prior to his filing a chapter 7 petition. For that reason, the court denies the defendant's motion for summary judgment under § 727(a)(5), as well.

(3) Nondischargeability of debt under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) provides that a debtor is not discharged from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false

representation, or actual fraud . . . ." The court notes that exceptions to discharge are construed strictly against a creditor and liberally in favor of the debtor. *See In re Morris*, 223 F.3d 548, 552 (7th Cir. 2000) (citing cases). A creditor raising a § 523(a) claim may sustain his burden of proof by demonstrating by a preponderance of the evidence that the debt meets the requirements of the statutory exception to discharge. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). Section 523(a)(2)(A) renders a debt nondischargeable when a creditor proves three elements: (1) that the debtor obtained the property or money through representations which the debtor either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) that the debtor possessed scienter, i.e., an intent to deceive; and (3) that the creditor actually relied on the false representations, and that its reliance was justifiable. *See Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 673 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995) (citing cases); *see also Field v. Mans*, 516 U.S. 59, 77 (1995) (holding that § 523(a)(2)(A) requires justifiable, not reasonable, reliance).

The defendant claimed that the court should determine that the debt he owes to the plaintiff is dischargeable under 11 U.S.C. § 523(a)(2)(A), because the defendant merely breached his contract with the plaintiff and did not commit actual fraud. He explained that, for three years, he had bought goods on credit with the plaintiff. Although the two checks the defendant wrote to Shannon were returned due to insufficient funds, the defendant insisted that he had sufficient funds in his account to pay the checks when they were written. He noted that he had paid the plaintiff more than $300,000.00 within the ninety-day period before he filed bankruptcy. The defendant claimed there was no evidence of an attempt to defraud the plaintiff. The plaintiff, in response, contended that the defendant knew that KeyBank was not going to increase his line of credit and knowingly issued checks drawn on an account with insufficient funds.

The court finds that the parties disagreed about whether the defendant knew, when he wrote the checks to the plaintiff, that there were or would be insufficient funds in his account to cover the checks. In the view of this court, neither party has met its burden of proving the elements of fraud, intent to deceive, and

reliance. The court finds that there are significant issues of material fact remaining for determination. Therefore, the court determines, this issue must be resolved at trial. Defendant's motion for summary judgment on § 523(a)(2) is denied.

Conclusion

For the reasons set forth above, the court denies the motions for summary judgment of both the plaintiff and the defendant. The court finds that genuine issues of material fact exist and therefore that neither party is entitled to summary judgment concerning the denial of the defendant's discharge, pursuant to 11 U.S.C. § 727(a)(4) and (a)(5), and the dischargeability of the debt to the plaintiff, pursuant to 11 U.S.C. § 523(a)(2)(A). Trial in this matter will be set by separate order.

SO ORDERED.

JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT